

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS ASHMON,

Defendant-Appellant.

UNPUBLISHED
February 15, 2007

No. 265376
Wayne Circuit Court
LC No. 05-003842-01

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant was convicted of three counts of assault with intent to murder, MCL 750.83, one count of discharge of a firearm from a motor vehicle, MCL 750.234a, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to three terms of thirteen to forty years' imprisonment for the assault with intent to murder convictions, two to four years' imprisonment for the discharge of a firearm from a motor vehicle conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to convict him of assault with intent to murder, discharge of a firearm from a motor vehicle, and felony-firearm. We disagree. This Court reviews a claim of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Assault with intent to murder, MCL 750.83, requires a showing of “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Elements of the crime, including intent, can be proven beyond a reasonable doubt using circumstantial evidence and reasonable inferences. *Id.* To prove discharge of a firearm from a motor vehicle, MCL 750.234a, the prosecution must show that a person intentionally discharged a firearm from a motor vehicle in such a manner as to endanger the safety of another. *People v Cortez*, 206 Mich App 204, 205-206; 520 NW2d 693 (1994). The elements of felony-firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Atkins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant argues that the prosecution failed to prove that defendant was the shooter because the eyewitness testimony was unreliable. Specifically, defendant states that Ramir Jackson's testimony was unreliable because he did not clearly see the shooter, and, therefore, probably identified defendant based on seeing him earlier at a gas station. Furthermore, given Jackson's testimony that he ducked when shots were fired, defendant asserts that it would have been impossible for Jackson to see the gun blast, even though Jackson testified that he did see it.

However, Jackson testified that he saw the driver of the car shoot the gun, and while he did not see the driver clearly, circumstantial evidence was presented from which the jury could infer that defendant was the driver of the car. Jackson saw defendant driving the car at the gas station, and defendant was the owner of the car. Furthermore, Jackson testified that he reclined in his seat after the shots were fired, not before, and, therefore, it would have been possible for him to see the gun blast. In addition, there was testimony from Justin Neely and Titus Petty that defendant was the driver and that they saw defendant shoot a gun at them. The jury chose to believe Jackson, Neely, and Petty, and this Court will not interfere with the jury's role of determining the credibility of witnesses.

Defendant also claims that the testimony of Jackson and Petty that they saw both the shooter and the gun blast was contradictory because it was either dark enough to see the gun blast, and therefore too dark to see the shooter, or it was light enough to see the shooter and thus too light to see the gun blast. Defendant further argues that Neely's testimony was contradictory because, while he testified that there was little lighting when the shots were fired, he was allegedly able to see defendant. However, this is speculation on behalf of defendant. No evidence was presented to show that a witness would only be capable of seeing either the shooter or the gun blast, but not both; nor was evidence presented that it was too dark for Neely to see defendant.

Defendant also argues that testimony from the forensic chemist that gunshot residue was found only in the back seat of defendant's car supports defendant's theory that Tommy,¹ defendant's back seat passenger, was the shooter. However, the chemist testified that it was possible that the gun was fired from the front seat even though gunshot residue was found only in the back seat. Furthermore, he testified that gunshot residue may have been present in the front seat, but due to the passage of time and use of the front seat area, the residue may have dissipated by the time the sample was taken. Again, it is the jury's role to determine the weight of evidence and credibility of witnesses. In viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to have found defendant

¹ Tommy's full name and address were unknown.

guilty beyond a reasonable doubt of assault with intent to murder, discharging a firearm from a motor vehicle, and felony-firearm.

Defendant next argues that his due process rights were violated because a pretrial lineup was impermissibly suggestive.² We disagree. This Court reviews an unpreserved claim of constitutional error for plain error that affected defendant's substantial rights. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Reversal is warranted only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A due process violation can occur if a lineup is so suggestive that there is a great likelihood of irreparable misidentification. *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). The fairness of an identification procedure is evaluated in light of all the circumstances. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). If counsel was present at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Generally, “physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness” *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993), quoting *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). Differences are significant if they “are apparent to the witness” and “substantially distinguish” the suspect from the other participants, such that “there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness’ identification.” *Id.* at 312, quoting *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988 (1991).

Defense counsel was present at the lineup, so the burden is on defendant to show that the lineup was impermissibly suggestive. Defendant points out that he was nineteen years old, while three of the men in the lineup with him were twenty-four years old, and the fifth man was thirty years old. Also, defendant weighed approximately 230 pounds at the time of the lineup, but two men in the lineup with him weighed only 160 pounds. An officer placed a large winter coat on one of the thinner men to make him look bulkier, but defendant argues that this was not enough to disguise his thinner build because the man's lower weight was still reflected in his face.

However, the physical differences in age and weight would not be so substantial that the witnesses would pick defendant because of those differences rather than because they recognized him. First, while the participants were between nineteen and thirty years old, defendant did not describe any physical disparities, such as gray hair, that would distinguish defendant from any other participant. Second, while two of the participants weighed 160 pounds, one of those men wore a heavy coat, and two men did weigh a similar amount as defendant. In addition, all participants were seated when viewed by the witnesses; thus, their physical builds would not be

² We note that Jackson, Neely, and Petty each identified defendant separately at the lineup.

as discernable as they would be if they were standing. Any physical differences would not substantially distinguish defendant from the other participants. Defendant has not carried his burden of showing that the pretrial lineup was impermissibly suggestive, and, therefore, the trial court did not err in its decision to admit the lineup identification evidence.

Last, defendant argues that he was denied the effective assistance of counsel. We disagree. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must show a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. *Id.* A defendant must overcome the strong presumption that his counsel was effective. *Id.*

Defendant argues that his counsel should have objected to the lineup because some of the participants differed in age and weight from defendant. Defendant claims that, because identity was the only issue at trial, failure to object to the lineup was ineffective assistance of counsel *per se*. However, we concluded previously that the lineup was not impermissibly suggestive, and counsel is not required to argue a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Thus, trial counsel was not ineffective for failing to object to the lineup procedure.

Defendant also claims that trial counsel was ineffective because he failed to object to the admission of the eyewitness identification of defendant at trial, which he claims was based on an impermissibly suggestive pretrial lineup. Defendant argues that because identity was the only issue at trial, and because the forensic evidence favored defendant, if counsel had moved to suppress the in-court identifications defendant would have prevailed. Again, however, we concluded that the lineup was not impermissibly suggestive, and counsel is not required to argue a meritless position. Thus, trial counsel was not ineffective for failing to object to the in-court identifications. Defendant has not met his burden of showing ineffective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter